A

ROPLI ISHAK

v.

HONG LEONG LEASING SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
HISHAMUDIN MOHD YUNUS JCA
AZIAH ALI JCA
HAMID SULTAN ABU BACKER JCA
[CIVIL APPEAL NO: B-03(IM)-104-02-2013]

C

17 FEBRUARY 2014

BANKRUPTCY: *Notice - Creditor's petition - Appeal against - Security in form of shares - Respondent as secured and petitioning creditor opted to give estimate of value of shares - Whether estimate of value of*

D

security flawed - Whether estimate given a sham - Whether estimate given could be questioned by debtor - Bankruptcy Act 1967, s. 5(2)

BANKRUPTCY: *Receiving and adjudication order - Appeal against - Security in form of shares - Respondent as secured and petitioning creditor opted to give estimate of value of shares - Whether estimate of value of*

E

security flawed - Whether estimate given a sham - Whether estimate given could be questioned by debtor - Bankruptcy Act 1967, s. 5(2)

Upon hearing the respondent's/creditor's (Hong Leong Leasing Sdn Bhd's) bankruptcy notice/petition, the Senior Assistant

F

Registrar ('SAR') had made a receiving and adjudicating order against the appellant/debtor. The appellant appealed to the High Court Judge against the SAR's decision. The High Court Judge, however, dismissed the appellant's appeal. Thus, this appeal by the appellant against the said decision. Briefly, the respondent was

G

a secured creditor. The security was in the form of 266,012 units of shares of a company called Everhome Furniture Manufacture (M) Sdn Bhd. These shares had been deposited by the appellant with the respondent as a security in respect of a term loan of RM15,300,000 granted by the respondent to the appellant. The

H

appellant had previously bought the shares from one Tan Khai Teck for RM20 million. When the appellant subsequently defaulted on the repayment of this loan, the respondent sued the appellant and had obtained a default judgment against the appellant in the sum of RM16,462,077.63. The sum now claimed

I

in the bankruptcy notice/petition was RM26,826,448.91. Under s. 5(2) of the Bankruptcy Act 1967 ('the Act'), the respondent being the petitioning creditor, opted to give an estimate of the

value of his security and estimated the value of the shares at RM500,000, based on an offer to buy back the shares by the said Tan Khai Teck who earlier had sold the shares for RM20 million to the appellant. It was the appellant's contention that this estimate by the respondent was flawed. The issue that arose herein was whether, as a matter of law, in opposing the respondent's petition, it was open to the appellant to contend that the estimate given by the respondent in his petition was flawed.

Held (dismissing appeal)
Per Hishamudin Mohd Yunus JCA (majority):

(1) In law, as long as the court is satisfied that the estimate is not a sham, the correctness of the estimate given in the petition by the respondent cannot be questioned by the appellant. There are authorities for the proposition that the correctness of the estimate given by a petitioning creditor in his petition could not be questioned by the debtor (*Ex Parte Taylor* and *In re Button*). They are also authorities for the further proposition that when it comes to proving the debt, the petitioning creditor would be bound by his estimate and cannot take any benefit in the administration in bankruptcy except on the basis of his estimate. Thus, the answer to the question posed ought to be in the negative. (paras 30 & 36)

Per Hamid Sultan Abu Backer JCA (dissenting):

(1) The central question in this appeal was in relation to s. 5(2) of the Act on the meaning of 'estimate of the value of security'. It is trite that bankruptcy proceedings are quasi penal in nature. Judgment creditors are obliged to strictly follow the provisions of the Act and/or rules unless the non-compliance is condonable pursuant to the Act and/or rules or fiat of case laws. The respondent herein clearly fell within the meaning of secured creditor. In addition, it is trite that a penal or quasi penal proceeding should be construed most favourable to the person affected. Thus, the phrase 'estimate of the value of security' must be objectively assessed and could not be a process done by plucking a figure on a subjective basis. In this case, the shares on record was purchased for RM20 million and to assert it was only RM500,000 based on an offer letter and not strictly by the process of estimate fell foul of the spirit

A and intent of s. 5(2) of the Act. This was not permissible when the Bankruptcy Act 1967 imposes the obligation on the creditor to assess the security. (paras 45 & 46)

Bahasa Malaysia *Translation Of Headnotes*

B Semasa perbicaraan notis/petisyen kebankrapan responden (Hong Leong Leasing Sdn Bhd), Penolong Kanan Pendaftar ('PKP') telah membuat satu perintah penerimaan dan penghakiman terhadap perayu/penghutang. Perayu membuat rayuan ke Hakim Mahkamah Tinggi terhadap keputusan PKP. Walau bagaimanapun, C Hakim Mahkamah Tinggi telah menolak rayuan perayu. Oleh itu, rayuan perayu ini terhadap keputusan tersebut. Secara ringkasnya, responden adalah pemiutang bercagar. Cagaran adalah dalam bentuk 266,012 unit saham sebuah syarikat Everhome Furniture Manufacture (M) Sdn Bhd. Saham-saham ini telah didepositkan D oleh perayu kepada responden sebagai cagaran berkenaan kemudahan pinjaman RM15,300,000 yang diberikan oleh responden kepada perayu. Perayu telah sebelum ini membeli saham tersebut daripada satu Tan Khai Teck untuk jumlah RM20 juta. Apabila perayu gagal membuat bayaran balik pinjaman ini, E responden telah menyaman perayu dan memperolehi penghakiman ingkar terhadap perayu dalam jumlah RM16,462,077.63. Jumlah yang sekarang dituntut dalam notis kebankrapan/petisyen adalah RM26,826,448.91. Di bawah s. 5(2) Akta Kebankrapan 1967 ('Akta'), responden sebagai pemiutang mempetisyen, memilih untuk F memberi anggaran nilai cagaran dan telah membuat penganggaran nilai saham-saham tersebut sebagai RM500,000, berdasarkan tawaran membeli semula saham oleh Tan Khai Teck yang sebelum ini telah menjual saham-saham tersebut kepada perayu untuk RM20 juta. Adalah hujahan perayu bahawa anggaran yang dibuat G oleh responden adalah cacat. Isu yang timbul adalah sama ada, sebagai hal perkara undang-undang, dalam menentang petisyen responden, ia adalah terbuka untuk perayu menghujahkan bahawa anggaran yang telah dibuat oleh responden adalah cacat.

H **Diputuskan (menolak rayuan)**
Oleh Hishamudin Mohd Yunus HMR (majoriti):

(1) Dari segi undang-undang, selagi mahkamah berpuas hati bahawa anggaran yang telah dibuat bukanlah satu kepura-I puraan, kebenaran anggaran yang dibuat oleh responden tidak boleh dipersoalkan oleh perayu. Terdapat autoriti-autoriti yang mencadangkan bahawa kebenaran anggaran yang dibuat oleh

pemiutang mempetisyen dalam petisyennya tidak boleh dipersoal oleh penghutang (*Ex Parte Taylor* dan *In re Button*). Ia juga autoriti-autoriti yang selanjutnya mencadangkan bahawa apabila membuktikan hutang, pemiutang mempetisyen terikat dengan anggaran yang dibuatnya dan tidak boleh mengambil manfaat dalam pentadbiran kebankrapan kecuali berdasarkan anggarannya. Oleh itu, jawapan kepada soalan yang telah dikemukakankan harus dijawab secara negatif.

Oleh Hamid Sultan Abu Backer HMR (menentang):

(1) Soalan utama dalam rayuan ini adalah berhubung s. 5(2) Akta berkenaan maksud 'anggaran nilai cagaran'. Adalah undang-undang mantap bahawa prosiding kebankrapan adalah bersifat kuasi hukuman. Pemiutang penghakiman berkewajipan untuk mengikut peruntukan-peruntukan dalam Akta dan/atau peraturan-peraturan kecuali jika ketidakpatuhan adalah diterima menurut Akta dan/atau peraturan-peraturan atau perintah kes undang-undang. Responden di sini dengan jelasnya terangkum dalam maksud pemiutang bercagar. Selanjutnya, ia adalah mantap bahawa hukuman atau prosiding kuasai hukuman seharusnya ditafsirkan memihak kepada pihak terjejas. Oleh itu, frasa 'anggaran nilai cagaran' harus ditafsirkan secara objektif dan tidak boleh menjadi proses yang dibuat dengan memetik satu angka atas dasar subjektif. Dalam kes ini, saham-saham yang direkodkan telah dibeli untuk RM20 juta dan untuk menegaskan ia hanya RM500,000 berdasarkan surat tawaran dan bukan dengan tegas oleh proses anggaran telah mencemari semangat dan niat s. 5(2) Akta. Ini tidak boleh dibenarkan apabila Akta Kebankrapan 1967 mengenakan kewajipan ke atas pemiutang untuk menilai cagaran.

Case(s) referred to:

Australia and New Zealand Banking Group Ltd v. Federal Commissioner of Taxation [1994] 119 ALR 727 ***(refd)***

Ex parte Taylor. In re Lacey [1884] 13 QBD 128 ***(refd)***

In re Button. Ex parte Voss [1905] 1 KB 602 ***(refd)***

JJ Savage & Sons Pty Ltd v. Blakney [1970] 110 CLR 435 ***(refd)***

Re Fong Yuan Kwong, Ex Parte Public Bank [1995] 1 LNS 203 HC ***(refd)***

Re Siow Ah Moi v. ex p United Orient Leasing Company Bhd [2007] 8 CLJ 104 HC ***(refd)***

Sobri Arshad v. Associated Tractors Sdn Bhd [1991] CLJ 798; [1991] 3 CLJ (Rep) 756 HC ***(refd)***

Wee Chow Yang t/a Vienna Music Centre v. Public Finance Bhd [1989] 3 MLJ 508 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 5(2)
Bankruptcy Rules 1969, r. 99
Federal Constitution, art. 5(1)

Bankruptcy Act of 1883 [UK], s. 6(2)

Other source(s) referred to:
Dennis Rose, *Australian Bankruptcy Law*, 9th edn, p 39
Rameshwar Dial, *An Exhaustive & Critical Commentary on The Provincial Insolvency Act 1920*, p 449
William and Muir Hunter, *The Law and Practice in Bankruptcy*, 19th edn, p 55

For the appellant - Sri Dev Nair (Ravin Woodhull with him); M/s Nayagam & Partners
For the respondent - Ling Chee Wei; M/s Ho, Loke & Koh

[Appeal from High Court, Shah Alam; Bankruptcy Notice No: 29-7832-2001]

Reported by Suhainah Wahiduddin

JUDGMENT

Hishamudin Mohd Yunus JCA:

[1] This is an appeal by the appellant/debtor (Ropli Ishak) against the decision of the learned judge of the High Court of Shah Alam. On 25 January 2013 the learned judge had dismissed the appellant's/debtor's appeal against the decision of the learned Senior Assistant Registrar of the High Court.

[2] Earlier, on 7 September 2012, the learned Senior Assistant Registrar, upon hearing the respondent's/creditor's (Hong Leong Leasing Sdn Bhd's) petition, had made a receiving order and adjudicating order against the appellant/debtor.

[3] Dissatisfied with the decision of the learned Senior Assistant Registrar, the appellant/debtor had appealed to the judge in chambers.

[4] The appeal was dismissed.

[5] The appellant/debtor now appeals to this court.

[6] In this judgment I shall be referring to the appellant/debtor as the 'appellant' and the respondent/creditor as the 'respondent'.

[7] The respondent filed the bankruptcy notice on 25 October 2001. A

[8] The petition was filed on 14 December 2006; and amended on 27 September 2011

[9] The appellant filed the notice to oppose the petition on 15 November 2011. B

[10] The respondent is a secured creditor. The security is in the form of 266,012 units of shares of a company called Everhome Furniture Manufacture (M) Sdn Bhd. These shares had been deposited by the appellant with the respondent as a security in respect of a term loan of RM15,300,000 granted by the respondent to the appellant on 14 April 1997. C

[11] The appellant had previously on 3 February 1997 bought the shares from one Tan Khai Teck for RM20 million. D

[12] As a security, the shares were registered by the respondent in the name of its nominee company, Hong Leong Nominee (Tempatan) Sdn Bhd. The registration was effected on 31 October 1998. E

[13] When the appellant subsequently defaulted on the repayment of this loan, the respondent sued the appellant and had, on 5 November 1998, obtained a default judgment against the appellant in the sum of RM16,462,077.63. F

[14] The sum now claimed in the bankruptcy notice/petition is RM26,826,448.91 (the default judgment sum of RM16,462,077.63 plus late payment interest of RM10,364,371.28).

[15] Now, s. 5(2) of the Bankruptcy Act 1967 ('the Act') deals with the situation where the petitioning creditor is a secured creditor; and it provides: G

5. Conditions on which creditor may petition H

(2) If the petitioning creditor is a secured creditor he must in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt or give an estimate of the value of his security. In the latter case he may to the extent of the balance of the debt due to him, after deducting the value so estimated, be admitted as a petitioning creditor in the same manner as if he were an unsecured creditor. I

[16] This provision must be read together with r. 99 of the Bankruptcy Rules 1969. Rule 99 prescribes the form to be used for the creditor's petition. The form is Form 9 as prescribed in the Appendix to the Rules. Form 9 contains a paragraph that states:

> That I hold security for the payment of (or part of) the said sum (but that I will give up such security for the benefit of the creditors of ... in the event of his being adjudged a bankrupt) (or and I estimate the value of such security at the sum of RM ...).

[17] Thus, under s. 5(2) of the Act, where the petitioning creditor is a secured creditor, he must either:

(a) state in his petition that he is willing to give up his security for the benefit of the creditors, in the event of the debtor being adjudged a bankrupt; or, alternatively,

(b) state in his petition, the estimated of the value of his security.

[18] Do note that the words used in sub-s. (2) of s. 5 are:

> ... give an estimate.

[19] The provision further provides that where a petitioning creditor opts for option (b) (that is, he opts to give an estimate of the value of his security), he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him, after deducting the value so estimated in the same manner as if he were an unsecured creditor.

[20] In the present case, the respondent, being the petitioning creditor, opts to give an estimate of the value of his security. The respondent's estimate of the value of the shares is RM500,000. Paragraph 3 of the amended petition (amended on 27 September 2011) states:

> 3. Bahawa kami menerusi nomini kami ada memegang cagaran dalam bentuk 266,012 unit saham di dalam Everhome Furniture Manufacture (M) Sdn Bhd bagi pembayaran wang tersebut dan kami anggarkan nilai cagaran itu sebanyak RM500,000.

[21] The respondent's estimate of the value of the shares as being RM500,000 is based on an offer to buy back the shares by the said Tan Khai Teck who earlier had sold the shares for RM20

million to the appellant. The offer by Tan Khai Teck to buy from the respondent the shares at RM500,000 was *via* a letter of 3 June 2010.

[22] It is the contention of the appellant, in opposing the petition, that this estimate by the respondent is 'flawed'. In paras. 16, 17 and 18 of his affidavit in opposition the appellant states:

> 16. Saya juga mempertikaikan kenyataan Pemiutang Penghakiman di perenggan 3 Petisyen Pemiutang Pindaan bahawa nilai 266,012 unit saham tersebut hanya dianggarkan sebanyak RM500,000.00 di mana saya telah membeli saham-saham tersebut dengan harga sebanyak RM20,000,000.00 pada asalnya.
>
> 17. Seterusnya Pemiutang Penghakiman telah menganggarkan nilai saham-saham tersebut pada harga sebanyak RM500,000.00 berdasarkan tawaran yang dibuat kepada Pemiutang Penghakiman pada 3.6.2010 oleh Tan Khai Teck, iaitu, penjual asal saham-saham tersebut kepada saya dengan harga jualan sebanyak RM20,000,000.00.
>
> Sesalinan exhibit yang ditandakan sebagai Exhibit A-3 di dalam Afidavit Sokongan yang diikrarkan oleh Lee Weng Swee pada 27.1.2011 bagi pihak Pemiutang Penghakiman ditunjukkan kepada saya dan ditandakan sebagai Exhibit "RI-10".
>
> 18. Seterusnya saya menyatakan anggaran sedemikian tidak benar oleh kerana ianya bukan prosedur yang betul untuk membuat anggaran kepada saham-saham tersebut dan peguamcara saya akan berhujah semasa bicara kelak berkenaan dengan efek undang-undang.

[23] In his written submission, the learned counsel for the appellant submits:

> 33. It is submitted that the bank's estimate that the shares are valued at RM500,000 is flawed.
>
> 34. …
>
> 35. Secondly, even if taken at current value (or at the filing or hearing of the Creditor's Petition), the valuation of RM500,000 based on the offer to buy by Tan Khai Teck is not acceptable because of the following reasons:

A

(a) The value of the shares was not based on valuation of the audited accounts of Everhome.

(b) Tan Khai Teck himself sold the 30% shares [that is the 266,012 units of shares] to the Appellant for RM20 million in 1997.

B

[24] The appellant submits that the petition should be dismissed since the estimate is flawed.

[25] However, the learned counsel for the appellant conceded C that the appellant is unable to ascertain the true value of the shares. To quote what is stated in his written submission:

(c) The Appellant is unable to ascertain by himself the true value of the 30% shares [that is the 266,012 units of shares] because Everhome in which Tan Khai Teck is the major D shareholder refuses to divulge information of the company and its accounts to the Appellant.

[26] In the present case, apart from the allegation that the estimate is flawed, there is no suggestion by the appellant that the E estimate given by the respondent is a sham. This being the case, the appellant is deemed to have conceded that the estimate is not a sham. Therefore, in the present case, whether the estimate given by the respondent is a sham or otherwise is not an issue.

[27] Therefore, the only issue in this appeal is this: as a matter F of law, in opposing the respondent's petition, is it opened to the appellant to contend that the estimate given by the respondent in his petition is flawed?

[28] The learned counsel for the appellant submits that the G appellant can question the correctness of the estimate. In so arguing, he refers to the book entitled *An Exhaustive & Critical Commentary on The Provincial Insolvency Act, 1920* by Rameshwar Dial where the learned author states (p. 449):

8. Sub-section (3); assessment of value of security. – Where H the secured creditor does not either realise or relinquish his security a third course is open to him in that he may assess the value of his security in his proof and prove for the balance. It is, however, a necessary obligation on the creditor that he must assess the security.

I

[29] What is stated by the learned author above is correct; but with respect to the learned counsel for the appellant, for the issue at hand, it is misleading to refer to this commentary because the learned author in his commentary is not commenting on that part of the bankruptcy process dealing with giving an estimate in the creditor's petition. In the above commentary, the learned author is dealing with that part of the bankruptcy process dealing with the proof of debts where the creditor is required to 'assess' (as opposed to merely giving an estimate) the value of his security. Our own Bankruptcy Act also contains a part that similarly deals with the proof of debts, that is, Schedule C of the Act. Paragraph 11 of this Schedule C, that deals with the proof of debts by a secured creditor (who does not either realise or surrender his security), like the Indian Bankruptcy Act, also uses the word 'assesses' (as opposed to using the word 'estimates'). This paragraph stipulates that the secured creditor shall, before ranking for dividend, state in his proof the value at which he assesses his security. However, in this appeal, we are not concerned with the proof of debts: we are still at the petition stage.

[30] In my judgment, the answer to the above question that I have posed ought to be in the negative. In other words, in law, as long as the court is satisfied that the estimate is not a sham, the correctness of the estimate given in the petition by the respondent cannot be questioned by the appellant.

[31] In support of the above proposition, I shall begin by referring to *The Law and Practice in Bankruptcy* (19th edn.) by William and Muir Hunter where the learned authors state (at p. 55):

> The court will not go into the question of the correctness of a real estimate, but the petitioning creditor will not be allowed to depart from that estimate when he comes to prove; …

[32] For the above statement of principle, the learned authors, in their footnotes, refer to two cases, namely:

(a) *In re Button. Ex parte Voss* [1905] 1 KB 602; and

(b) *Ex parte Taylor. In re Lacey* [1884] 13 QBD 128.

[33] The other work that I propose to refer to is *The Law of Insolvency* by Ian F Fletcher where the learned author states:

> One point which merits comment at the outset is the fact that the creditor is allowed to place his own estimation of value upon the security which he holds, for the words of section 269(1)(b) require only an 'estimate' and not a true and accurate valuation of the security. So, provided that the estimate is itself a genuine one, the courts have traditionally not inquired into its correctness financially even though the result of such an inquiry might be to show that the unsecured balance of the debt was not sufficiently large to support the petition. It may also happen that the creditor has no real idea of the true value of the security he holds, and his estimate may be a pure guess; nevertheless, provided that the undervaluation is not shown to be a total sham, such estimates have been allowed to stand.

[34] In *Ex parte Taylor* the court had to interpret s. 6(2) of the [UK] Bankruptcy Act of 1883 (which is in *pari materia* with s. 5(2) of our Bankruptcy Act). In that case, the petitioner had estimated the value of the security at the sum of 9l. On the hearing of the petition, evidence was taken with the view of showing that the petitioner had undervalued his security, and that, if he had put a fair value on it, the balance due to him would have been less than 50l, so that he would not have been entitled to present a petition. The petitioner was examined, and he deposed that he had no knowledge as to the real value of the property; he had not seen the land. The debtor was examined, and he deposed that the value of the land was 60l. He had let it at 3l a year ground rent. He was a surveyor and accustomed to value land, and had had experience, particularly in the value of land in that neighbourhood. He had put a value on the land according to the rent. Cave J held (at p. 130):

> Sub-s. 2 of s. 6 only requires the creditor to 'give an estimate of the value of his security', and this the appellant has done. He can, if he pleases, give up his security for the benefit of the creditors. He is bound by the estimate which he makes; and in this case, unless he obtains leave to amend his estimate, which he can only do if he has made a *bona fide* mistake, he must give up his security to the trustee for 9l. Sect. 6 does not require that the estimated value shall be the true value. If the value of the security is underestimated, the other creditors will, in the event of a bankruptcy, get the benefit of it.

[35] In *In re Button* the English Court of Appeal also had to deal with s. 6(2) of Bankruptcy Act of 1883. Vaughan Williams LJ said (at pp. 604-605): A

> Upon the evidence it seems to me impossible to say that the creditor has not complied with the requirements of sub-s. 2 of s. 6 of the Bankruptcy Act 1883, in the case of a petition by a secured creditor. In my opinion the creditor has complied with the provision as to the valuation of his security. He has given an estimate, and it is admitted that his estimate is such that it is not possible to say that it is a mere sham and not a substantial estimate. It has been urged upon us that the registrar should, when the petitioning creditor estimates his security inquire whether the estimate is right. I think that the intention of the sub-section, which throws upon the creditor the duty of making the estimate, is to avoid the necessity of any such inquiry. It is said that this is not likely to have been the intention of the Legislature, because it would enable a malicious or unscrupulous petitioning creditor to make a fictitious estimate and undervalue his security, and obtain a receiving order upon that estimate, although in truth and in fact he was fully secured, or so much secured that the unsecured part would not be sufficient to support a bankruptcy petition. The answer to that is that the petitioning creditor makes the estimate at his own risk; and if a bankruptcy occurs it is plain that, although the Bankruptcy Rules may not apply to that estimate when he comes in to prove, as was stated by Wright J. in *In re Vautin, Ex parte Saffrey* [1899] 2 QB 549 - and I am inclined to think that they do not apply – yet he is bound in this sense, that he cannot take any benefit in the administration in bankruptcy except on the basis of that estimate ... In my opinion, when one arrives at the conclusion that the estimate is real and not a sham, we ought not to go into the question what is the true value after the declaration of the estimated value.

B C D E F G

[36] The above authorities cited are authorities for the proposition that the correctness of the estimate given by a petitioning creditor in his petition cannot be questioned by the debtor. They are also authorities for the further proposition that when it comes to proving the debt, the petitioning creditor would be bound by his estimate and cannot take any benefit in the administration in bankruptcy except on the basis of his estimate. H

[37] I am, therefore, dismissing the appeal with costs.

[38] My learned sister, Aziah Ali, JCA, has read this judgment and agrees with it. I

[Appeal dismissed with costs.]

A **Hamid Sultan Abu Backer JCA:**

[39] The appellant's appeal in relation to AO and RO orders in bankruptcy proceedings came up for hearing on 9 October 2013 and upon hearing the appeal we reserved the judgment to
B 17 February 2014.

[40] The central question in this appeal relates to s. 5(2) of Bankruptcy Act 1967 (BA 1967) on the meaning of 'estimate of the value of security'. (See *Re Fong Yuan Kwong, Ex Parte Public Bank* [1995] 1 LNS 203; *Re Siow Ah Moi v. ex p United Orient*
C *Leasing Company Bhd* [2007] 8 CLJ 104].

Brief Facts

[41] The appellant appeals against the decision of the High Court
D which (i) dismissed the appellant's notice to oppose the creditors petition (CP); (ii) allowed the CP and granted AO and RO.

[42] The respondent has secured a judgment against the appellant. The respondent had 'Everhome Shares' from the
E appellant as security. The shares had been purchased by the appellant for RM20 million and it was partly financed by the respondent by advancing a loan sum of RM15.3 million. The respondent had transferred the shares to its name even before the judgment was obtained and the complaint is that no fair value has
F been given. The CP states that the shares are estimated at RM500,000. The estimate of the shares was not derived from an independent valuation of the shares but based on an offer dated 13 December 2010 by the person who sold the shares, to the appellant for RM20 million. Section 5(2) of BA 1967 states:

G > If the petitioning creditor is a secured creditor he must in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt or give an estimate of the value of his security.
>
H > In the latter case he may to the extent of the balance of the debt due to him, after deducting the value so estimated, be admitted as a petitioning creditor in the same manner as if he were an unsecured creditor.

[43] The learned counsel for the appellant says:

I > Secondly even if taken as current value (or at the filing or hearing of the Creditor's Petition), the valuation of RM500,000.00 based on the offer to buy by Tan Khai Teck is not acceptable because of the following reasons:

(a) The value of the shares was not based on valuation of the audited accounts of Everhome.

(b) Tan Khai Teck himself sold the 30% shares to the Appellant for RM20 million in 1997.

(c) The appellant is unable to ascertain by himself the true value of the 30% shares because Everhome in which Tan Khai Teck is the major shareholder refuse to divulge information of the company and its accounts to the appellant.

(d) The respondent while maintaining that the shares are rather worthless still want to keep it by giving it a low value of RM500,000.00.

(e) If the shares are at a low value, it is questionable as to why the respondent refuses to exercise its alternative right under Section 5(2) Bankruptcy Act to give it up to the benefit of other creditors. In other words the respondent still want to hold on to the shares but gives it a value of only RM500,000.00."

[44] I have read the appeal records and submissions of the parties in detail. I am grateful to the comprehensive submissions of the learned counsel. It will serve no useful purpose to repeat save to deal with the core issues. After much consideration to the submissions of the learned counsel for the respondent, I am of the considered view that the appeal must be allowed. My reasons *inter alia* are as follows:

(i) It is trite that bankruptcy proceedings are quasi-penal in nature. Judgment creditors are obliged to strictly follow the provisions of the Act and/or rules unless the non-compliance is condonable pursuant to the Act and/or rules or fiat of case laws. (see *Wee Chow Yang t/a Vienna Music Centre v. Public Finance Bhd* [1989] 3 MLJ 508). In *Sobri Arshad v. Associated Tractors Sdn Bhd* [1991] CLJ 798; [1991] 3 CLJ (Rep) 756; [1991] 3 MLJ 32, Edgar Joseph Jr observed:

> On a concluding note, bearing in mind that bankruptcy proceedings, if successful, would have harsh and penal consequence meticulous compliance with the law is often necessary. The case of *In re North ex-parte Hasluck* is the authority for the proposition that the statute relating to bankruptcy should be construed in a manner most favourable to the person affected.

Failure to comply may attract art. 5(1) of the Federal Constitution which reads as follows:

> No person shall be deprived of his life or personal liberty save in accordance with law.

In the light of art. 5(1), English cases on bankruptcy law must be read with caution.

[45] In the instant case the respondent will clearly fall within the meaning of secured creditor. In addition it is trite that a penal or quasi-penal proceeding should be construed most favourable to the person effected. Thus, the phrase estimate of the value of 'security' must be objectively assessed and cannot be a process done by plucking a figure on a subjective basis. Support for the proposition can be found in a number of cases as well as legal literature. To name a few are as follows:

(a) The learned author of "*The New Shorter Oxford English Dictionary*" defines 'estimate' as follows:

> The action or an act of valuing or appraising; an approximate judgment of the number, quantity, position, etc. of something; the number, etc. so assigned.

(b) The learned author of Butterworth's *Australian Legal Dictionary* in dealing with approximation states:

> The formation of a *bona fide* judgment or opinion based upon reason that involves a process of approximation.

(c) The learned author Dennis Rose on '*Australian Bankruptcy Law* (9th edition)' in reliance of the Australian provision at p. 39 opines:

> A secured creditor who is unwilling to surrender the security can only petition on the basis of the amount (if any) by which the debt exceeds the value of the security as estimated by the creditor for the purpose.

(d) The learned author Rameshwar Dial on the '*Indian Provincial Insolvency Act, 1920*' at p. 449 states:

> Where the secured creditor does not either realize or relinquish his security a third course is open to him in that he may assess the value of his security in his proof and prove for the balance. It is, however a necessary obligation on the creditor that he must access the security.

(e) In *Australia and New Zealand Banking Group Ltd v. Federal Commissioner of Taxation* [1994] 119 ALR 727, it was stated:

> The concept of 'estimate' does not involve arbitrarily seizing upon any figure. What it involved is the formation of a judgment or opinion based upon reason. That judgment or opinion must necessarily be made *bona fide* but it need not be exact for the process of estimation involves a process of approximation. As Lord Loreburn said in *Sun Insurance Office v. Clark* [1992] AC 443 at 454:
>
> > ... there is an obligation as well to review these estimates on a period basis. This statutory background itself suggest that no matter how difficult it may be, the valuation on these claims is not incapable of estimation.

(f) In *JJ Savage & Sons Pty Ltd v. Blakney* [1970] 110 CLR 435, it was held as follows:

> The expression 'estimated speed' did not in the circumstances mean approximate speed but indicated an expression of opinion as the result of 'approximate calculation based on probability'.

[46] I have gone through the authorities and legal literature submitted by the respondent. None of them are supportive of subjective or cavalier exercise in determining an estimate of the security. In the instant case the shares on record was purchased for RM20 million and to assert it is only RM500,000 based on an offer letter and not strictly by the process of estimate will fall foul of the spirit and intent of s. 5(2) BA 1967. This is not permissible when the BA 1967 imposes the obligation on the creditor to assess the security.

[47] For reasons stated above, I will allow the appeal with costs, with a note that my learned brother Justice Dato' Mohd Hishamudin bin Mohd Yunus and my learned sister Justice Dato' Aziah binti Ali by majority have dismissed the appeal.